In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 903

JAMES HENRY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Southern District of California of knowingly receiving goods stolen from interstate commerce in violation of 18 U.S.C. 659. On December 7, 1964, he was sentenced to imprisonment for a term of three years. The court of appeals affirmed the conviction (361 F. 2d 352).

The facts showed that on or about August 3, 1964, a trailer truck was stolen from a shipping company and was later found abandoned (Tr. 21–24).[1] Stolen from the truck were chemicals, 2 rolls of rugs, 13 cartons of automobile parts, 4 cartons of transmis-

[1] "Tr." designates the transcript of trial proceedings at Volumes II and III of the record on appeal.

sion supports, and 22 cartons of pressure regulators (the latter being the subject of the indictment), all of which were being shipped in interstate commerce (Tr. 32, 34–35). The stolen goods were sold by two unknown men to one John Persley for $300.00 (Tr. 40–41). Later that week, Persley, who then knew that the goods were stolen, told petitioner that two men brought him a truck and that he had "a truckload of stuff" he wanted to get rid of (Tr. 43–45, 88). The following Monday, petitioner agreed to purchase all the pressure regulators, for $110.00. That same day, Persley, together with co-defendant Fuller, delivered the regulators, still in their original shipping containers, to petitioner's used car lot (Tr. 47–49). Petitioner told Persley that he would not accept these goods in their original cartons. Persley thereupon returned to his garage and placed the regulators into used boxes (Tr. 49–50). When petitioner finally accepted the regulators, he did not request a bill of sale (Tr. 94), although he normally sought such documents with other purchases (Tr. 219).

Sometime later, petitioner delivered these regulators to the Industrial Production Supply Company, a wholesaler for such goods (Tr. 116). An attempt was made to resell them to the Meeder Equipment Co., and the regulators were seized by local authorities, who had previously warned the Meeder Company of the stolen inventory (Tr. 116–120).

1. The jury retired to deliberate at 2:30 on a Friday afternoon (Tr. 284). At 5:00, the jury was recalled, and it advised the court that no verdict had been reached (Tr. 292). The judge inquired about

the parking problems of the individual jurors (Tr. 292–294), and the following occurred (Tr. 294–296):

COURT. Here is the situation. The case has taken the better part of three days to try, it has cost the Government and defendants some considerable money, if you can arrive at a verdict you should do so. Now I dislike to unexpectedly this way lock a jury up for the night, especially on Friday night when you probably did not anticipate when you left your homes this morning that this would happen, so I think that everyone should make an effort to arrive at a verdict of either guilty or not guilty, and if you think that you can arrive at a verdict, say, by 5:30—is there a 5:30 deadline when they take the [car] keys away?

Juror SCOTT. Yes.

COURT. Do you all have your parking tickets? (Assent.)

My law clerk, Mr. Simpson, can collect the tickets and get the keys if thye will write their names on the back of the tickets and the type of car they have which might expedite matters. Do you think, Mr. Foreman, that you can arrive at a verdict, say, in the next 20 minutes?

FOREMAN. Your Honor, I don't think we can.

COURT. Well, do you think after talking to you now that you might?

FOREMAN. I doubt it.

COURT. I see. Well, I dislike to declare a mistrial because if I declare a mistrial I start over again next Tuesday and it will be before another jury who I don't suspect will be any more intelligent than you. To me it doesn't look like the case is an extremely complicated one, it doesn't have any bookkeeping or account-

> ing features, it is a one-count indictment, you have all heard the evidence, so why don't you go back upstairs and come down here at 20 minutes after 5:00 and see if you can arrive at a verdict in the next twenty minutes.

At 5:40, the foreman of the jury sent a question to the court requesting a summary of testimony relating to the time when petitioner agreed to resell the regulators to the Industrial Production Supply Company (Tr. 297). At 5:50, after review with all counsel, the court advised the jury that petitioner's own testimony indicated that he agreed to resell even prior to his agreement to purchase from Persley (Tr. 302). The jury returned a guilty verdict against both defendants at 6:10 p.m. (Tr. 303).

Petitioner made no objection to the judge's supplementary remarks when they were made or at any later time. In fact, during a hearing on a motion for a new trial, petitioner's counsel expressly stated that he was not taking issue with the procedure followed (Tr. 334).[2] In the court below, petitioner urged for the

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[2] In arguing for a new trial on grounds of newly discovered evidence, petitioner's counsel stated, *inter alia* (Tr. 334–335):

> Mr. BERNARD. I mean this, that it was a Friday, as I understand it, and it was past 5:00 o'clock, and the jurors had not agreed upon a verdict ... .
>
> The COURT. That is right.
>
> Mr. BERNARD. . . . and this Court pressed this jury with a duty to try to reach a verdict, if possible. I am sure this wasn't anything unusual. I am not at issue with what your honor said. I am very familiar how your Honor instructs a jury after they have gone into deliberations, I am not making any criticism of that at all, but I am stating this, that they had not yet agreed and I think your Honor called them down to determine whether or not they

first time that these instructions were coercive and prejudicial.

The judge's remarks were not, in any event, coercive in the same sense as the supplementary instruction in *Jenkins* v. *United States,* 380 U.S. 445. For while the judge attempted, at first, to encourage the jury to reach a verdict promptly, he did not override or criticize the foreman's response that the jury's deliberation was unlikely to be concluded so quickly. And since the judge made arrangements to enable the jurors to retrieve their automobiles from the parking lot, there were no coercive circumstances requiring them to arrive at a verdict. Indeed, the jury demonstrated that it was not coerced by deliberating for more than an hour after the judge's instructions.

2. The determination by the jury that petitioner knew that the regulators were stolen does not warrant review by this Court. Such knowledge may be proved circumstantially. *United States* v. *Spatuzza,* 331 F. 2d 214 (C.A. 7), certiorari denied, 379 U.S. 829; *Robinson* v. *United States,* 333 F. 2d 323 (C.A. 8); *United States* v. *Allegrucci,* 258 F. 2d 70 (C.A. 3). The circumstances of this case warranted an inference that petitioner knew that these regulators had been stolen.

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had agreed at that time. But I feel that a different result would have been obtained, and as your Honor knows in these affidavits for a motion for a new trial, the courts have said that not every detail of a person's testimony necessarily has to be included in the affidavit, if it is substantial and if it appears that a different result might have been obtained that that is sufficient, and I think that there would have been a different result had the testimony of this witness Aaron Fuller been presented to the jury.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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